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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 49A04-0711-CR-616

STATE OF INDIANA,
Appellee-Plaintiff.

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 23
The Honorable Patrick Murphy, Judge
Cause Nos. 49G23-0508-FC-136171 and 49G23-0512-FC-208379

June 10, 2008

FRIEDLANDER, Judge

Demetrius Edwards appeals the revocation of his probation. As the sole issue on appeal, Edwards argues that the evidence was insufficient to establish that he violated his probation by constructively possessing a handgun.

We affirm.

On August 12, 2005, Edwards was charged with burglary as a class C felony and theft as a class D felony under Cause No. 49G03-0508-FC-136171 (FC-136171). On December 5, 2005, Edwards was charged with robbery as a class C felony and criminal confinement as a class D felony under Cause No. 49G06-0512-FC-208379 (FC-208379).¹ On April 27, 2006, Edwards entered into a written plea agreement with the State in which he agreed to plead guilty to burglary under FC-136171 and robbery under FC-208379 and the State agreed to dismiss the remaining charges. With regard to sentencing, the plea agreement provided that there would be a cap of four years on executed time and that the sentences imposed under the different causes would be served concurrently. The trial court accepted the plea agreement. Following a May 5, 2006 sentencing hearing, the court sentenced Edwards on each conviction to four years, with two years suspended, and, in accordance with the plea agreement, ordered the sentences to be served concurrently. The court ordered that Edwards serve a year on probation. As a standard condition of probation, Edwards was prohibited from possessing a firearm.

On June 4, 2007, Officer Christopher Cavanaugh of the Indianapolis Metropolitan Police Department was on patrol when he observed Edwards, who was on probation at

¹ On June 8, 2007, both causes were “transferred into Court G23” and assigned new cause numbers indicating such change, i.e., the first part of each of the cause number was changed to “49G23”. *Appellant’s Appendix* at 17, 115.

the time, sitting in the front-passenger seat of a vehicle traveling westbound near 35th Street and Kenwood. Edwards was not wearing a seatbelt. Officer Cavanaugh initiated a traffic stop for the seatbelt violation. As Officer Cavanaugh approached the driver, he immediately detected the smell of marijuana emanating from the vehicle. The driver informed the officer that he had been smoking marijuana earlier that day and volunteered that there was a “roach”² in the ashtray. *Transcript* at 22. Officer Cavanaugh placed the driver and Edwards in handcuffs and read them their Miranda rights. In the meantime, Officer Sean McCurdy conducted a search of the passenger compartment of the vehicle and discovered a semi-automatic handgun loaded with thirteen rounds under the passenger seat where Edwards had been sitting. The butt of the gun was facing up toward the front, right side of the seat.

Officer Cavanaugh questioned Edwards about the gun, and he responded, “Well, I guess if it’s underneath my seat, it’s my handgun.” *Id.* at 24. Edwards then told Officer Cavanaugh that the gun belonged to his aunt. Edwards admitted that he knew the gun was in the car before he got in and asked the officers at the scene if his aunt could reclaim it.

On June 12, 2007, the State filed a notice of probation violation under both causes. Following a hearing on September 20, 2007, the trial court revoked Edwards’s probation and ordered that he serve two years executed for each underlying conviction, with the sentences to be served concurrently.

² By indicating the presence of a “roach”, the driver was referring to “a small, hollowed out cigar containing marijuana”. *Transcript* at 22.

Probation revocation proceedings are civil in nature. *Marsh v. State*, 818 N.E.2d 143 (Ind. Ct. App. 2004). Therefore, the State is required to prove a violation by only a preponderance of the evidence. Ind. Code Ann. § 35-38-2-3(e) (West, PREMISE through 2007 1st Regular Sess.); *Marsh v. State*, 818 N.E.2d 143. When reviewing the determination that a probation violation occurred, we neither reweigh the evidence nor reassess witness credibility. *Marsh v. State*, 818 N.E.2d 143. Instead, we look at the evidence most favorable to the court's judgment and determine whether there is substantial evidence of probative value supporting revocation. *Id.* If so, we will affirm. *Id.*

Edwards contends that the trial court erred in finding sufficient evidence that he violated his probation by constructively possessing a handgun. Edwards maintains that the court's finding of constructive possession was based on a series of unreasonable inferences. Even though Edwards admits that he knew the gun was in the vehicle, he argues that the evidence did not demonstrate that he had the intent and capability to maintain dominion and control over it.

Possession of a handgun may be either actual or constructive. *See Henderson v. State*, 715 N.E.2d 833 (Ind. 1999). "Actual possession occurs when the defendant has direct physical control over the item, while constructive possession involves the intent and capability to maintain control over the item even though actual physical control is absent." *Britt v. State*, 810 N.E.2d 1077, 1082 (Ind. Ct. App. 2004). Here, we are presented with the issue of constructive possession. Evidence of constructive possession is sufficient where the State proves that the defendant had both the capability and intent

to maintain dominion and control over the contraband. *Goliday v. State*, 708 N.E.2d 4 (Ind. 1999). To prove the intent element, the State must demonstrate the defendant's knowledge of the presence of the contraband. *Id.* Knowledge may be inferred from the exclusive dominion and control over the premise containing the contraband or additional circumstances indicating the defendant's knowledge of the contraband if the control over the premise is non-exclusive. *Id.* Evidence that the defendant is able to reduce the contraband to the defendant's personal possession is sufficient evidence to establish the defendant had the capability to maintain dominion and control over the item. *Id.* Proof of dominion and control over contraband has been found through a variety of means: (1) incriminating statements by the defendant, (2) attempted flight or furtive gestures, (3) proximity of the contraband to the defendant, (4) location of the contraband within the defendant's plain view, and (5) the mingling of contraband with other items owned by the defendant. *Henderson v. State*, 715 N.E.2d 833.

Here, Edwards admitted that he knew the gun was in the car and further claimed that it belonged to his aunt. This evidence proves that Edwards had knowledge of the presence of the weapon in the car. With regard to capability to maintain dominion and control over the gun, we note that the gun was located next to Edwards's feet under the passenger seat of the car where he was sitting with the butt of the gun facing upward. With little effort during the search of the car, the officer discovered its existence. This evidence demonstrates that Edwards could have easily reduced the gun to his personal possession. Edwards's close proximity to the gun coupled with the fact that Edwards

knew the gun was in the vehicle is sufficient evidence to prove by a preponderance of the evidence that Edwards constructively possessed the gun.

Edwards's arguments challenging the above evidence are merely requests for this court to reweigh the evidence, a task which we will not undertake on appeal. We therefore conclude that the trial court did not abuse its discretion when it found that Edwards violated his probation by constructively possessing a handgun.

Judgment affirmed.

KIRSCH, J., and BAILEY, J., concur.